Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

BARBER FOODS, INC.,

Cross-Petitioner,

v.

ABDELA TUM, *et al.*,

Cross-Respondents.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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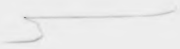

QUESTION PRESENTED

Is the donning and doffing of all required clothing and equipment necessarily an integral and indispensable part of employees' compensable principal activities, or is the time spent donning and doffing such clothing and equipment noncompensable preliminary and postliminary activities under section 4(a) of the Portal-to-Portal Act, 29 U.S.C. § 254(a), unless it involves special protective gear that is uniquely and closely related to dangers inherent in a particular job and compelled by vital considerations of health, safety or hygiene?

PARTIES TO THE PROCEEDING BELOW

In addition to the parties named in the caption, the following parties appeared below and are petitioners and cross-respondents here: Nicholas Bearce, Allison Carey, Celso Florendo, Letecheal Hailu, Robert Huntley, Ken LeMarche, Ernest Levesque, Natalie Luongo, Paul Mason, Derso Mekonen, The Ngo, Tadeusz Olsyzynski, Joseph Raymond, Doug Robito, Najib Sayed, Laurie Secord, Kevin Snow, Evelyn Theunissen, Heidi Wallace and Mintwab Yimam.

CORPORATE DISCLOSURE STATEMENT

Barber Foods is a privately held corporation. It has no parent company, and there are no publicly held companies owning 10% or more of the corporation's stock.

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Cross-Petitioner Barber Foods, Inc. conditionally cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit (Pet. App. 1a-19a) is reported at 360 F.3d 274 (1st Cir. 2004). The recommended decision of the magistrate judge on defendant's motion for summary judgment (Pet. App. 20a-48a) is not reported in F. Supp. 2d. It is unofficially reported at 2002 WL 89399 (D. Me. 2002). The district court's order affirming this recommended decision (Pet. App. 49a-50a) is unpublished.

STATEMENT OF JURISDICTION

Judgment was originally entered on June 3, 2003. A petition for rehearing was filed on June 17, 2003. The petition for rehearing was granted, the original judgment was vacated, and a new opinion issued and judgment entered on March 10, 2004. On May 28, 2004 an extension of time for the filing of a petition for a writ of certiorari was granted. The petition was docketed on July 15, 2004. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 12.5 of the Rules of the Supreme Court and is conditional upon the Court's granting of Petitioners' petition for a writ of certiorari.

RELEVANT STATUTORY PROVISION

The relevant provision of the Fair Labor Standards Act, 29 U.S.C. § 254(a), is set forth at Pet. App. 51a-52a.

STATEMENT OF THE CASE

This is a collective action pursuant to the provisions of section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), brought by a group of current and former employees of Barber Foods seeking compensation for alleged unrecorded and uncompensated work performed by them for the company. Partial summary judgment was granted in favor of Barber Foods, Pet. App. 20a-50a, and judgment was entered in favor of Barber Foods on the remaining claims after a jury trial. Plaintiffs appealed the judgment to the Court of Appeals for the First Circuit which, after rehearing, affirmed the judgment in all respects. *Tum v. Barber Foods, Inc.*, 360 F.3d 274 (1st Cir. 2004); Pet. App. 1a-19a. Plaintiffs have petitioned this Court for a writ of certiorari. Barber Foods submits this conditional cross-petition.

Barber Foods is a further processor of poultry-based products. It has no slaughtering, butchering, or deboning operations. It purchases boneless chicken breast in bulk and processes that raw material into finished products such as stuffed entrees, chicken fingers, and nuggets. The petitioners fall within four general job classifications: rotating associates who staff the production lines, set-up operators who tend the various machines on the line, meatroom associates who work where the raw product is blended with ingredients, and shipping and receiving associates. All associates are required to wear a lab coat, hairnet, earplugs, and safety glasses while on the production floor. There are other items of clothing or

equipment worn by some associates for comfort, sanitary, or safety reasons. Depending upon job classification, assignment, and personal preference, some combination of the following may be worn: vinyl gloves, cotton glove liners, vinyl aprons, sleeve covers, bump hats, back belts, and safety boots.

Rotating associates are required to wear lab coats, hairnets, earplugs, and safety glasses. The lab coat, hairnet, and earplugs must be on before they can punch in and until they punch out. Safety glasses and any items that they choose but are not required to wear, such as gloves, aprons, and sleeve covers, can be donned after punching in and before punching out. Set-up operators must wear lab coats, hairnets, earplugs, safety glasses, safety boots, bump hats, and back belts. Any other items they choose to wear may be donned after punching in. Meatroom associates are required to wear lab coats, hairnets, earplugs, safety glasses, safety boots, back-belts, aprons and vinyl gloves. Many also choose to wear sleeve covers. The apron, gloves and sleeve covers can be donned after punching in and before punching out. Shipping and receiving associates are required to wear safety boots, hard hats and back-belts. They generally don these items before punching in and doff them after punching out. Their time clock is located on the production floor, so they must don and doff a lab coat, hairnet, and earplugs briefly to enter the production floor to punch in and out.

Lab coats and cotton glove liners are obtained by associates in the hallway between the entranceway and the equipment cage. The lab coats are on hangar racks and the glove liners are in tubs. Hairnets, earplugs, vinyl gloves, sleeve covers, and aprons are dispensed from the window of the equipment cage. Vinyl gloves, sleeve covers, and aprons

are also available from tubs on the production floor. Bump hats, back belts, safety glasses, safety boots, and reusable earplugs are dispensed once and then replaced as needed.

Lab coats and cotton glove liners are laundered and reused. Laundry bins are located along the hallway from the production floor exits to the plant exits and associates drop the coats and liners in these bins on their way out of the plant. Vinyl gloves, sleeve covers and aprons are disposable. Trash bins are located on the production floor and along the hallways from the production floor exits to the plant exits. These items may be removed and deposited in the trash bins on the production floor before punching out if the associate chooses. Bump hats, back belts, safety glasses, safety boots, and reusable earplugs are retained by associates and may be stored in their locker or taken home.

Associates are expected to be on the production floor ready to work when their shift begins. They are paid from the time they actually punch in to a computerized time-keeping system. Each associate has a swipe card. Time clocks are located at the entrances to the production floor. Rotating associates, set-up operators, and meatroom associates punch in at a clock in the area where they will be working and punch out on clocks which are located next to the two primary exits from the production floor. Shipping and receiving associates punch in and out on the plant office clock located on the production floor by the shipping and receiving office. Associates are paid from the moment they punch in. They are allowed twelve minutes of "swing time", meaning that they can punch in up to six minutes early and get paid from that time or up to six minutes late without incurring an attendance violation.

The petitioners contend that they are entitled to be compensated for the following activities: (1) donning and doffing of all clothing and equipment required by Barber Foods or government regulation as well as any "necessitated by working conditions", even if not required, (2) time spent walking to and from their work stations on the production floor after donning and before doffing such gear, and (3) time spent waiting to obtain any clothing and equipment from the equipment cage or other distribution station and time spent waiting to punch in at the time clocks after donning such clothing and equipment.

Barber Foods moved for summary judgment in its favor on all claims. In a recommended decision affirmed by the district court, the magistrate judge made two rulings central to the present dispute. With respect to donning and doffing, the court concluded that "the donning and doffing of clothing and equipment required by the defendant or by government regulation, as opposed to clothing and equipment which employees choose to wear or use at their option, is an integral part of the plaintiffs' work for the defendant" and thus "are not excluded from compensation under the Portal-to-Portal Act as preliminary or postliminary activities." *Tum v. Barber Foods Inc.*, 2002 WL 89399, at *9, 10 (D. Me. 2002); Pet App. 36a-37a, 40a. With respect to walking and waiting time, the court ruled that Barber Foods "is entitled to summary judgment on any claims based on time spent walking from the plant entrances to an employee's workstation, locker, time clock or site where clothing and equipment required to be worn on the job is to be obtained and any claims based on time spent waiting to punch in or out or for such clothing or equipment." *Id.* at *8; Pet. App. 33a-34a.

A trial was held on the amount of time reasonably spent engaged in donning and doffing the required clothing and equipment in the relevant job categories and whether that time was *de minimis*. The jury found that the combined donning and doffing times ranged from one minute for rotating associates to two minutes sixteen seconds for set-up operators and determined that this time was *de minimis*. Petitioners appealed.

The First Circuit affirmed. 331 F.3d 1 (1st Cir. 2003). A petition for rehearing was granted, the original judgment was vacated, and a new opinion issued, again affirming the district court in all respects. *Tum v. Barber Foods, Inc*, 360 F.3d 274 (1st Cir. 2004); Pet. App. 1a-19a. The court of appeals agreed that the donning and doffing of required gear is an integral and indispensable part of the employees' principal activities and thus compensable, *Id.* at 279, Pet. App. 7a, but concluded that all of the other activities at issue in the case, including the donning and doffing of non-required gear, time spent waiting to obtain required clothing and gear and to punch in at time clocks after donning such gear, and time spent walking to and from the employees' work stations after donning and before doffing required gear, were preliminary and postliminary activities exempted from compensation by the Portal-to-Portal Act. *Id.* at 280-82; Pet App. 8a-12a.

Plaintiffs petitioned this Court for a writ of certiorari. Barber Foods has responded with this conditional cross-petition.

REASONS FOR GRANTING THE PETITION

Petitioners have petitioned for a writ of certiorari presenting, *inter alia*, the issues of whether time spent waiting to obtain required clothing and equipment and time spent walking to and from their work stations after donning the first item and before doffing the last item of such gear is compensable work under the Fair Labor Standards Act or noncompensable preliminary and postliminary activity under the Portal-to-Portal Act. Barber Foods' conditional cross-petition presents the important related question of whether the donning and doffing of the clothing and equipment involved in this case is an integral and indispensable part of the Petitioners' compensable principal activities or is a noncompensable preliminary and postliminary activity.

If the Court grants the petition, it should also grant the cross-petition. The question presented by the cross-petition is inextricably intertwined with the issues raised by the petition, because the Petitioners' arguments in support of the compensability of walking and waiting time are entirely dependent upon the compensability of the donning and doffing activities. On the latter issue, the courts of appeals are in conflict and their opinions on the subject evince considerable disagreement and uncertainty over the correct test for determining when such activity should be considered an integral and indispensable part of employees' principal activities. Granting the cross-petition will allow the Court to provide much-needed guidance to the courts on this critical and recurring issue regarding the scope and application of the Portal-to-Portal Act.

I. ***The questions presented by the petition and cross-petition are inextricably intertwined; the Petitioners' position on the compensability of walking and waiting time is entirely dependent on the compensability of the donning and doffing activities in question.***

In their petition, Petitioners present the issues of whether time spent waiting to obtain required clothing and equipment and time spent walking to and from their work stations after donning the first item and before doffing the last item is compensable work. The case for the compensability of this walking and waiting time is premised on the compensability of the donning and doffing activity in question.

The Petitioners' argument is simple: The Portal-to-Portal Act exempts from compensation only preliminary and postliminary activities "which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. § 254(a). Any walking time which occurs after the commencement of the employees' first principal activity and before the completion of their last principal activity is compensable work because it is part of the "workday" and not exempted from compensation by section 4(a). The court of appeals held that the donning and doffing of required clothing and equipment is an integral and indispensable part of the employees' principal activities. Therefore, Petitioners argue, walking to and from their work stations after donning and before doffing, though normally noncompensable, *see* 29 C.F.R. §§ 790.7(e), 790.7(f)(1), is compensable in this case because it occurs between the commencement and completion of the principal activities of donning and doffing required gear. With respect to time spent

waiting to obtain the required gear, Petitioners contend that this activity is integral and indispensable to the principal activity of donning that gear.

Thus, Petitioners' arguments for the compensability of walking and waiting time, even if one accepts them, rise or fall on the court of appeals' holding that the donning and doffing at issue is an integral and indispensable part of the employees' principal activities. If the donning and doffing is not a compensable principal activity, there is no other basis for arguing that any of the associated walking or waiting time is compensable. If the Court grants Petitioners' petition, it should also grant this cross-petition in order to address the viability of this basic underlying premise of Petitioners' case. A decision in Barber Foods' favor on the question presented by the cross-petition would obviate the necessity of reaching any of the issues presented by the petition.

II. *The cross-petition presents an important question that has divided the circuits and merits this Court's review.*

This cross-petition presents the important and recurring question of what the correct standard is for determining when the donning and doffing of required clothing and equipment is noncompensable preliminary and postliminary activity under the Portal-to-Portal Act and when it is an integral and indispensable part of employees' compensable principal activities. The courts of appeals are in conflict over the issue and their opinions reflect considerable disagreement and uncertainty as to the appropriate test.

In this case, all associates must wear lab coats, hairnets, earplugs, and safety glasses. For rotating associates, who represent the largest category of employees, these four items

are the only clothing and gear that they are required to wear. Depending upon job classification, other associates may also be required to wear some combination of safety boots, back belts, hard hats, aprons, vinyl gloves, and sleeve covers. However, hard hats, aprons, vinyl gloves, and sleeve covers may be donned after punching in and before punching out, so no matter what the job category the following is the only required gear that must be donned before punching in and worn until after punching out: lab coats, hairnets, earplugs, safety glasses, safety boots, and back belts.

In its decision in this case, the First Circuit became the first and only court of appeals to hold that the donning and doffing of these or similar items of required clothing and equipment are compensable work activities. 360 F.3d at 279, Pet. App. 7a. The Tenth, Ninth, and Fifth Circuits have all ruled that the donning and doffing of required gear such as that involved in the present case is not compensable. *Reich v. IBP, Inc.*, 38 F.3d 1123 (10th Cir. 1994) (smocks, hairnets, earplugs, safety glasses, hard hats, safety boots); *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003) (frocks, hairnets, earplugs, safety glasses, hard hats, boots); *Anderson v. Pilgrim's Pride Corp.*, 44 Fed. Appx. 652 (5th Cir. 2002), *aff'g*, 147 F. Supp. 2d 556 (E.D. Tex. 2001) (smocks, hairnets, earplugs, safety glasses, gloves, boots, sleeve covers).

Although these courts disagree with the First Circuit on the compensability of donning and doffing the clothing and equipment in question, they employ a variety of different reasons for doing so. In *Reich*, the Tenth Circuit held that the donning of sanitary outer garments such as a smock was preliminary/postliminary clothes changing activity, 38 F.3d at 1126, while the donning and doffing of "standard" protective gear such as hard hats, earplugs, safety glasses,

and safety boots, even though integral and indispensable to the employees' principal activities, did not rise to the level of compensable "work." *Id.* at 1125-26. The court also intimated, without deciding, that any time spent donning and doffing these items was *de minimis* as a matter of law. *Id.* at 1126 n.1. In *Alvarez*, the Ninth Circuit ruled that the donning and doffing of "non-unique protective gear," which in that case consisted of smocks, hairnets, earplugs, safety glasses, and safety boots,[1] was "work" and integral and indispensable to the employees' principal activities, but held that it was not compensable because it was *de minimis* as a matter of law. 339 F.3d at 902-04. In *Pilgrim's Pride*, the Fifth Circuit affirmed a decision by the district court that the donning and doffing of smocks, hairnets, earplugs, safety glasses, boots, gloves, aprons, and sleeve covers was not compensable on the alternative grounds that it was not "work," 147 F. Supp. 2d at 561-62, that it was preliminary/postliminary clothes changing activity which was not integral and indispensable to the employees' principal activity, *id.* at 563, and that it was *de minimis* as a matter of law. *Id.* at 564.

As it presently stands, donning and doffing of clothing and equipment like that involved in this case is compensable in the First Circuit, not compensable in the Tenth, Ninth and

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1. Although the court of appeals referred to non-unique protective gear "such as" hard hats and safety glasses, it affirmed, albeit for different reasons, the judgment of the district court concerning the compensability *vel non* of the various items of clothing and equipment involved. The items of "non-unique protective gear" are identified in the district court's opinion as "including and limited to hard hats, earplugs, frocks, safety goggles, a hair net, and boots . . ." *Alvarez v. IBP, Inc.*, No. CT-98-5005-RNW, slip op. at 19 n.6 (E.D. Wash. Sept. 14, 2001) (unpublished opinion).

Fifth Circuits, and employers and employees in the other circuits are left wondering which rule applies to them. This is an issue which affects innumerable employees and employers across many industries including poultry processing, meatpacking, pharmaceuticals, semiconductors, biotechnology, and many other manufacturing industries. If the Court grants Petitioners' petition, it should also grant the cross-petition and resolve this conflict among the courts of appeals and provide guidance to the lower courts on the standard for determining when donning and doffing of clothing and equipment is noncompensable preliminary and postliminary activity as opposed to an integral and indispensable part of compensable principal activity.

III. *The court of appeals erred in holding that the donning and doffing time in this case is an integral and indispensable part of the employees' principal activities.*

Under the Portal-to-Portal Act, employers are not obligated to compensate employees for "walking, riding or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform" or for "activities which are preliminary to or postliminary to said principal activity or activities" where such traveling or activities "occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities." 29 U.S.C. § 254(a). However, activities performed either before or after the regular work shift are compensable "if those activities are an integral and indispensable part of the [employee's] principal activities . . . and are not specifically excluded by Section 4(a)(1)." *Steiner v. Mitchell*,

350 U.S. 247, 256 (1956). In the present case, the court of appeals held that the donning and doffing of all clothing and equipment required by Barber Foods or government regulation is integral to the employee's principal activities and thus compensable. This was error. A review of the history behind the Portal-to-Portal Act demonstrates that donning and doffing of clothing and equipment of the type involved in this case was intended to be excluded from compensable time as preliminary and postliminary activities.

Compensable "work" under the Fair Labor Standards Act has been defined as "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944). In *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) this Court, applying the *Tennessee Coal* definition of "work", held that employees were entitled to compensation for certain "preliminary" activities performed after arriving at the workplace but before beginning their principal work activities, including "putting on aprons and overalls, removing shirts, taping or greasing arms, putting on finger cots, preparing the equipment for production work, turning on switches for lights and machinery, opening windows, and assembling and sharpening tools." *Id.* at 692-93. The Portal-to-Portal Act was enacted in response to the *Mt. Clemens* decision. Among the examples of noncompensable preliminary and postliminary activities specifically enumerated in the Senate report on the Act were "[c]hecking in or out and waiting in line to do so, *changing clothes*, washing up or showering, [and] waiting in line to receive

paychecks." S. Rep. No. 48, 80th Cong., 1st Sess. p. 47 (1947).[2] The regulations confirm that clothes changing "when performed under the conditions normally present" would generally be considered noncompensable preliminary and postliminary activities. 29 C.F.R. § 790.7(g). In *Steiner*, this Court recognized a limited and narrow exception to this general rule. Emphasizing that "changing clothes . . . under normal conditions . . . ordinarily constitutes 'preliminary' or 'postliminary' activities excluded from compensable work time as contemplated in the Act," 350 U.S. at 249, the Court held that where employees were exposed to and made "extensive use of dangerously caustic and toxic materials, and [were] compelled by circumstances, including vital considerations of health and hygiene, to change clothes and to shower in facilities which state law require[d] their employer to provide," such clothes changing was an integral and indispensable part of the employers' compensable principal activities. *Id.* at 248, 256.

Several important principles can be gleaned from the Act and the case law and regulations interpreting it. First, the concepts of "work" and noncompensable preliminary or postliminary activities are not mutually exclusive. In other words, the fact that an activity may constitute "work" under the *Tennessee Coal* definition does not mean that the activity must either be a principal activity or integral to a principal activity. Even if an activity constitutes "work" it may still be a noncompensable preliminary or postliminary activity because the very purpose of the section 4(a) of the Act was to relieve employers from the obligation to compensate

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2. "Changing clothes" encompasses the donning and doffing of sanitary and protective clothing and equipment. *See*, June 6, 2002 opinion letter to the Department of Labor's Wage and Hour Division, 2002 WL 32406592.

employees for certain preliminary and postliminary activities that would otherwise be compensable and the only reason they would otherwise be compensable is if they constituted "work." *See*, 29 C.F.R. § 790.4(a)(1):

> The primary Congressional objectives in enacting section 4 [were to] minimize uncertainty as to the liabilities of employers which it was felt might arise in the future if the compensability under the [FLSA] of such preliminary or postliminary activities should continue to be tested solely by existing criteria for determining compensable worktime.

Id. § 790.2(a) (The Act "contemplates that employers will be relieved, in certain circumstances, from liabilities . . . to which they might otherwise be subject under the [FLSA]"); *Id.* § 790.4(a) (Section 4 "relieves the employer from certain liabilities . . . to which he might otherwise be subject under the provisions of the ([FLSA]"). Thus, even if the Petitioners' donning and doffing can be considered "work", it may still be preliminary and postliminary activity.

Second, the fact that certain clothing is required by an employer or by government regulation or that its donning is of benefit to the employer does not automatically transform the donning and doffing of that clothing from noncompensable preliminary and postliminary activity to compensable principal activity. The very nature of preliminary activities is that they are a prerequisite to the performance of the principal activities and thus are obviously required, either explicitly or implicitly, by the employer and are of benefit to it. To say that any activity which is required by and of some benefit to the employer, which is the

Tennessee Coal definition of "work", cannot be a preliminary or postliminary activity but must necessarily be considered an integral and indispensable part of the principal activity, is in effect to transpose the criteria for determining "work" onto the criteria for determining preliminary or postliminary activity even though the purpose of section 4 was to exclude such activity from the "existing criteria for determining compensable worktime." *Id.* § 790.4(a)(1).

Third, the noncompensability of clothes changing is the rule, not the exception. *Steiner*, 350 U.S. at 249; 29 C.F.R. § 790.7(g). The courts have recognized limited exceptions to this general rule regarding the noncompensability of clothes changing in situations involving special protective gear that is uniquely and closely related to dangers inherent in a particular job, such as knife-wielding employees engaged in slaughtering and butchering operations in a meatpacking plant, *Reich*, 38 F.3d at 1126, and employees exposed to and making extensive use of dangerously caustic and toxic materials in which clothes changing is "compelled by circumstances, including vital considerations of health and hygiene." *Steiner*, 350 U.S. at 248.

Applying these principles to the present case, it is evident that the court of appeals erred in holding that the donning and doffing of the clothing and equipment in question is an integral and indispensable part of the employees' compensable principal activities solely because it is required. This holding conflates the test for determining whether an activity is an integral and indispensable part of the employees' principal activities with the test for determining whether an activity constitutes "work" even though an express purpose of the Portal-to-Portal Act was to exempt as preliminary and postliminary activities some activities that previously would

have been considered to be compensable work. Clothes *changing is an integral and indispensable part of employees'* principal activities only when it involves special protective gear that is uniquely and closely related to dangers inherent in a particular job and is compelled by vital considerations of health and hygiene. That is not the situation in this case. The First Circuit stands alone in concluding that the donning and doffing of the standard sanitary and protective gear of the type involved in this case is compensable. Its holding in this regard was error.

CONCLUSION

For the foregoing reasons, if the Court grants the petition for certiorari, it should also grant this conditional cross-petition.

Respectfully submitted,

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IN THE

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Barber Foods, Inc., d/b/a Barber Foods,
Cross-Petitioner,

v.

Abdela Tum, et al.

On Conditional Cross-Petition for a Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

RESPONSE TO CONDITIONAL CROSS-PETITION

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RESPONSE TO CROSS-PETITION

Cross-petitioner Barber Foods (Barber) does not dispute that the questions presented by the petition for certiorari are important and have divided the circuits. See Pet. 5-11. The Solicitor General in the parallel *IBP* case comes to the same conclusion. Br. of United States in *IBP, Inc. v. Alvarez*, No. 03-1238, at 7-12. Nor does Barber dispute that this case provides an appropriate vehicle for this Court to address these questions. See Pet. 12-13. As the United States explains in *IBP*, this case "would likely provide the Court an opportunity to resolve the existing disagreement among the circuits over the walking time issue." U.S. *IBP* Br. at 15-16 n.2.

This Court should accordingly grant certiorari in both *IBP* and this case and consolidate the two for argument. The critical facts in the two cases – particularly, the equipment involved – are somewhat different, and the Court would benefit from considering the questions presented in a broader context. Certiorari should not be granted in *IBP* alone because, as the Solicitor General explains, only this case raises a further "question of considerable significance to the administration of the FLSA—whether donning and doffing time should be considered together with walking time in assessing whether the time devoted to those activities is de minimis, or whether donning and doffing time should instead be examined in isolation." *Ibid.*

The *IBP* petitioner argues at cross-purposes with itself in contending that this case is a poor vehicle because the number of plaintiffs (22) and the amount of damages claimed ($70,000) are, in its view, "trivial." Supplemental Br. of IBP, Inc. in No. 03-1238, at 7. There is certainly no genuine suggestion that the parties will not litigate this case vigorously. For petitioners, hourly wage workers, the amount of money at stake is substantial; IBP's point that it faces considerable liability is just a back-handed acknowledgement that its position would deprive employees of considerable compensation for work they perform. Barber Foods faces not only the dam-

ages award IBP cites but also the prospect of substantial attorneys fees if petitioners prevail; Barber has therefore found the claim sufficiently important that it has litigated the case aggressively, including through, for example, a jury trial and cross-petition for certiorari. Indeed, if the *IBP* petitioner is correct that the amount at stake for a party affects the vigor with which it litigates – and thus the strength of the adversarial presentation in this Court – that is an argument for granting cert. in this case rather than *IBP*: the Solicitor General's very point was that the plaintiff-respondents in *IBP* have nothing to gain financially by litigating the case here, given that they are already guaranteed an equivalent award under state law.

For its part, Barber urges the Court to review the First Circuit's decision in this case for a further reason: to resolve an alleged circuit conflict over whether time spent donning and doffing required light safety equipment is compensable. The conditional cross-petition should be denied, however. Barber does not seek a change in the court of appeals' judgment: Barber secured complete relief against petitioners' claims in the lower courts, and it would secure no further relief by prevailing on the question raised by the cross-petition.

Certiorari on the issue raised by the cross-petition is inappropriate for a further reason: the court of appeals did not finally decide the issue. This Court accordingly should resolve the issues raised by the petition, but should leave the question presented by the cross-petition to be addressed in the first instance on remand to the extent they were properly preserved below.

Finally, Barber is also wrong on the merits of the issue the cross-petition raises. *Steiner* v. *Mitchell*, 350 U.S. 247 (1956), settled that time spent donning and doffing safety equipment that is required by the employee's working conditions is compensable work to which the Portal-to-Portal Act's exclusion of preliminary and postliminary activities does not apply. Those lower courts that have held otherwise have

misunderstood this Court's precedents and conflated the distinct questions whether an activity is "work" and whether the time it takes to perform that activity is *de minimis*.

ARGUMENT

I. Because Barber Foods Does Not Seek To Alter The Judgment In This Case, Its Cross-Petition Is Improper.

Barber Foods prevailed below as to every component of petitioners' claims; petitioners were awarded neither damages nor any other relief. To be sure, the district court denied Barber summary judgment on the issue raised by the cross-petition, holding that the time petitioners spent donning and doffing required equipment was compensable work under the Fair Labor Standards Act and Portal-to-Portal Act. But the jury subsequently found that the time spent on that donning and doffing, taken alone, was *de minimis*, and therefore awarded no relief. The court of appeals let that judgment stand. Barber thus does not seek to alter the judgment, nor could the judgment possibly be altered in Barber's favor as a direct or indirect result of a favorable resolution of the question presented by the cross-petition.

Despite the fact that it had already prevailed entirely at the district court level, Barber Foods cross-appealed to the First Circuit, challenging the partial denial of summary judgment. The court of appeals correctly refused to consider the cross-appeal, citing this Court's recent admonition that "[a]s a general rule, a party may not appeal from a favorable judgment simply to obtain review of findings it deems erroneous." *Mathias* v. *Worldcom Techs.*, 535 U.S. 682, 684 (2002) (dismissing writ as improvidently granted). As the First Circuit explained, "[i]f we were to do as Barber Foods asks and reverse the challenged district court finding, our action would provide no tangible relief to Barber Foods; the company has already received all requested relief." Pet. App. 12a.

The same rule applies in this Court. A respondent must cross-petition "if such party seeks to change the judgment below or any part thereof." STERN, GRESSMAN, SHAPIRO, & GELLER, SUPREME COURT PRACTICE § 6.35, at 444 (8th ed. 2002). But if the respondent seeks no such change, a cross-petition is not necessary or appropriate. A prevailing party may, without cross-petitioning, defend the judgment of the court below "on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979); see also, *e.g.*, *Jones* v. *United States*, 527 U.S. 373, 396 (1999); *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 364 (1994). See generally STERN, GRESSMAN, SHAPIRO, & GELLER, *supra*, at 444-48. The assertion of a "different legal basis" for a judgment, which is precisely what Barber seeks here, does not constitute a request for modification of a judgment. *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982).

Because the cross-petition is unnecessary, it should be denied. Prevailing parties not only are not required to appeal or petition; they may not do so. See *Mathias*, 535 U.S. at 684 (dismissing certiorari because "a party *may not* appeal from a favorable judgment" (emphasis added)); *Lindheimer* v. *Illinois Bell Tel. Co.*, 292 U.S. 151, 176 (1934) (a party "has no right of appeal from [a] decree in its favor").

II. In Any Event, The Questions Raised By The Cross-Petition Should Be Resolved, If Necessary, On Remand.

If this Court denies the cross-petition, Barber may raise the arguments set forth in the cross-petition as alternate grounds for upholding the judgment below. However, this Court need not and should not reach those arguments, because, as noted above, the court of appeals has never addressed them. See Pet. App. 12a; see also Answer of Barber Foods to Pet. for Panel Rehr'g and Rehr'g En Banc at 15 ("The panel did not find it necessary to address Barber Foods'

cross-appeal because it determined that the walking and waiting time at issue was noncompensable even assuming that it followed compensable doffing. * * * Barber Foods believes the panel's decision was correct. If the panel were to consider retreating from that position, it would then become necessary to address the central issue raised by the cross-appeal—the compensability of the donning and doffing in this case * * *.").

If this Court grants certiorari on the issues raised by the petition, but not those raised by the conditional cross-petition, and then rules on the merits in petitioners' favor, it should—to the extent these issues remain relevant and properly preserved—remand the case for the court of appeals to determine in the first instance the compensability of the underlying donning and doffing activities. See, *e.g.*, *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999) (declining to consider respondents' alternate argument in defense of judgment below because "we do not decide in the first instance issues not decided below").

Nor is the purported circuit conflict identified by the cross-petition logically antecedent to the questions presented by the petition. The cross-petition is incorrect in its assertion (at 9) that under either the Ninth Circuit's approach in *Alvarez* or the Tenth Circuit's approach in *IBP* v. *Reich*, 38 F.3d 1123 (1994), petitioners' claim would fail because the time they spent donning and doffing equipment would not be compensable.

Although the First, Ninth, and Tenth Circuits have indeed taken slightly varying approaches to determining whether time spent donning and doffing various types of equipment is compensable, at least *some* of the items petitioners donned and doffed are sufficiently heavy and time-consuming to don that the time associated with them would plainly be compensable under all three circuits' rules. For example, among the equipment Barber Foods requires set-up operators, meatroom associates, and shipping associates to use are back belts (also known as weight belts), safety harnesses that pro-

tect workers who must move or lift heavy objects from injury. The district court in *Alvarez* specifically held time spent donning and doffing such belts compensable, and the Ninth Circuit affirmed this holding. 2001 U.S. Dist. LEXIS 25344, *36 (E.D. Wa. 2001), *aff'd*, 339 F.3d 894, 903-04 (2003). Similarly, in *Reich*, weight belts were among those items the Tenth Circuit deemed "special safety equipment," the donning and doffing of which was compensable. 38 F.3d at 1124-25.

Thus, even if the compensability of walking and waiting time depended on some of the associated donning and doffing time being compensable, that requirement—under any of the circuits' approaches—would be satisfied here. Moreover, petitioners have argued that "walking and waiting" time is compensable in its own right; its compensability does not turn on that of the associated donning and doffing. Walking, waiting, donning, and doffing are all "integral and indispensable" to petitioners' principal job activities. Petitioners' view, and that of the Department of Labor, is that the *first* compensable activity an employee undertakes triggers the start of a continuous, compensable "workday"; that activity need not be donning a piece of gear, but could be, for example, waiting in line at an equipment distribution station.[1]

The questions posed by the petition and the cross-petition may therefore be interrelated, but this Court's ability to answer the former does not depend on its also answering the latter. Indeed, depending on how this Court resolves the questions raised by the petition, the questions raised by the cross-petition may become irrelevant. To the extent they remain relevant, they can be resolved on remand if properly preserved.

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[1] Furthermore, petitioners have argued that time spent on all compensable activities should be aggregated for the purpose of the *de minimis* rule, such that it would not matter whether time spent donning or doffing certain equipment is, per the Ninth Circuit's rule, *de minimis* when taken alone. See Pet. 9-10; *supra* at 1.

III. Petitioners Are Correct On The Merits Of The Question Presented By The Cross-Petition.

As the petition explained (at 17), there are two separate steps involved in determining whether the FLSA requires an employer to compensate an employee for the time spent on a particular activity. First, the court must determine whether the activity is compensable work: that is, whether it meets the definition of "work," and is not statutorily excluded from that definition by the Portal-to-Portal Act as "preliminary" or "postliminary" activity. Second, the factfinder must determine whether the time spent on compensable activities is more than *de minimis*. If both requirements are met, the employer must pay. *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946).

The Tenth Circuit has improperly conflated the two questions, while the First Circuit (in this case) and Ninth Circuit (in *Alvarez*) have correctly recognized the distinction between them. The Tenth Circuit in *Reich* erred in holding that donning and doffing light safety gear does not constitute "work" because it involves no "exertion." Indeed, cross-petitioners notably do not defend the Tenth Circuit's reasoning. *Reich* squarely conflicts with this Court's holding in *Tennessee Coal, Iron, & Railroad Co.* v. *Muscoda Local No. 123*, 321 U.S. 590 (1944), which refers specifically to "physical or mental exertion *(whether burdensome or not)*." *Id.* at 598 (emphasis added). There is simply no question that donning and doffing, for example, a lab coat, safety goggles, a hard hat, and gloves involves "exertion" – a term that cannot be meant to imply that a task is difficult or particularly time-consuming, because that reading would read out the emphasized qualifier. Although it is true that the FLSA does not impose liability on the employer for activities that, taken together, occupy very little time, that is because of the *de minimis* rule, not because of the definition of "work." *Reich* conflates the two distinct inquiries.

While correctly holding that time spent donning and doffing "unique" safety equipment was (along with associated walking and waiting time) compensable, the Ninth Circuit nonetheless erred in holding that time spent donning and doffing "non-unique" equipment was "*de minimis* as a matter of law." Cross-petitioners also notably do not defend the Ninth Circuit's rule. This Court held in *Mt. Clemens*, the case that established the *de minimis* rule, that its application turned on findings of fact. 328 U.S. at 692 ("The *de minimis* rule can doubtless be applied to much of the walking time involved in this case, but the precise scope of that application can be determined only *after the trier of facts makes more definite findings* as to the amount of walking time in issue." (emphasis added)). It cannot be true, as Barber would have it, that time spent donning and doffing certain types of equipment is simply categorically *de minimis*; it matters greatly how much time is spent, a fact question that will vary from case to case.

Moreover, as explained in the petition for certiorari, the consensus view among lower courts is that the various compensable activities performed in a workday should be aggregated together in order to determine whether the *de minimis* rule applies. See Pet. 9 (collecting cases). Indeed, many courts aggregate across the entire period encompassed by the claim; but at the very least, activities in a particular day should be added together. It contravenes the point of the *de minimis* rule to calculate separately the amount of time spent donning each particular piece of equipment, or, for that matter, particular categories of equipment. The Ninth Circuit thus erred in holding that, even though time spent walking, waiting, and donning and doffing "unique" equipment was compensable, time spent donning and doffing "non-unique" equipment was *de minimis*: the *de minimis* determination should have been based on the time spent on all of those activities added together.

Barber instead presses in the question presented by the cross-petition an argument that *no* court of appeals has adopted – *viz.*, that the donning and doffing of light safety

equipment is "preliminary" or "postliminary" activity excluded from compensation by the Portal-to-Portal Act. This novel argument lacks merit as well. Barber quotes a Labor Department regulation to the effect that "clothes changing 'when performed under the conditions normally present' would generally be considered noncompensable preliminary and postliminary activities," a rule that this Court supposedly "[e]mphasiz[ed]" in *Steiner* v. *Mitchell*, 350 U.S. 247 (1956). Cross-Pet. 13-14 (quoting 29 C.F.R. 790.7(g)). That is not accurate: the regulation provides that clothes changing is preliminary or postliminary, *except in circumstances like these*, where the clothes are donned for health and safety reasons. 29 C.F.R. 790.7(g) n.49 ("[T]he changing of clothes[] may in certain circumstances be so directly related to the specific work the employee is employed to perform that it would be regarded as an integral part of the employee's 'principal activity.'"). *Steiner*, in turn, settled that compensation was required in these circumstances. 350 U.S. at 252-53, 256.

Nor can Barber identify any support in either the regulation or any of this Court's cases to support the line it would draw: that time spent donning and doffing "heavy" or "unique" equipment is compensable, but "light" or "non-unique" equipment is not. That distinction is so vague as to be un-administrable. Equally important, it has nothing to do with whether an activity is "integral" or instead "preliminary or postliminary" to the employers' duties. At the very least, once an employer or the government determines that equipment *is required* for health and safety reasons, it is implausible to say that the donning and doffing of that equipment is not integrally related to work activities.[2]

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[2] Petitioners, of course, maintain—and this Court's decision in *Steiner* makes clear—that the relevant criterion should be whether the activity is in *fact* required for health or safety reasons because of the nature of the job and the working conditions, even if it is not formally required by the employer or by law. See Pet. i, 22-23.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for certiorari should be granted and the cross-petition denied.

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